**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| Sponsorship Identification Rules and Embedded Advertising | ) | MB Docket No. 08-90 |

# REPLY COMMENTS OF TIME WARNER INC.

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**REPLY COMMENTS OF**
**TIME WARNER INC.**

Time Warner Inc. ("Time Warner") hereby responds to comments filed in the above-captioned proceeding.[1] In particular, Time Warner demonstrates that: (1) the Commission lacks authority to expand its sponsorship identification rules to cable networks; (2) there is no factual or policy basis for the Commission to revisit the exemption from the rules for feature films later carried on broadcast television; and (3) proposals to adopt new rules specific to children's television are unnecessary.

## I. THE COMMISSION DOES NOT HAVE AUTHORITY TO EXPAND ITS SPONSORSHIP IDENTIFICATION RULES TO CABLE NETWORKS.

Advocates of expanding the sponsorship identification rules are incorrect in asserting that the Commission has authority to impose the rules on cable networks.[2] Section 317 of the Communications Act -- the statutory basis for the sponsorship identification rules -- applies

[1] *Sponsorship Identification Rules and Embedded Advertising*, Notice of Inquiry and Notice of Proposed Rulemaking, 23 FCC Rcd. 10682 (2008) ("NOI/NPRM").

[2] *See* Commercial Alert Comments at 26-27; Writers Guild of America, West Comments at 3, 9; N.E. Marsden Comments at 37-38. Contrary to the suggestions of the Marin Institute, *see* Marin Institute Comments at 7, HBO is a subscription-based service and does not accept paid product placements in its programming.

exclusively to broadcasters.[3] Moreover, the Commission is statutorily barred from extending the rules to cable networks. When Congress enacted the 1984 Cable Act, it included a provision -- Section 624(f)(1) -- that specifically prohibits the Commission and other governmental entities from imposing "requirements regarding the provision or content of cable services, except as expressly provided in [Title VI]."[4] There is no provision in Title VI of the Act that provides the Commission with authority to impose sponsorship identification rules on cable networks. Thus, any attempt by the Commission to do so would be in direct conflict with Section 624(f)(1).

Section 624(f)(2) includes a limited exception to Section 624(f)(1)'s prohibition on content regulation for (1) rules that were in effect on September 21, 1983, or (2) rules that are amended after that date provided the amendment is "not inconsistent with the express provisions of [Title VI]."[5] However, this exception does not allow the Commission to apply the sponsorship identification rules to cable networks. Although the sponsorship identification rules for origination cablecasting were adopted in 1969 and in effect on September 21, 1983,[6] cable networks were not included within their scope, and thus cannot be made subject to new rules on the issue.[7] And, as NCTA explains, adopting new rules that not only apply to a whole new area

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[3] 47 U.S.C. § 317 ("All matter broadcast by any radio station for which money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person.").

[4] 47 U.S.C. § 544(f)(1). According to the legislative history, this provision "limits the authority of the FCC . . . to regulate the provision or content of cable services other than as provided in this new title of the Communications Act." H.R. Rep. No. 98-934 at 70 (1984).

[5] 47 U.S.C. § 544(f)(2)(A). Section 624(f)(2) also includes an exception for "any rules, regulation, or order under title 17, United States Code" (*i.e.*, federal copyright law), *id.* § 544(f)(2)(B), but that exception is inapplicable as the Commission has no authority to adopt rules under Title 17.

[6] *See Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Systems*, 20 FCC 2d. 201, 219-20 (1969).

[7] The Commission's rules define "origination cablecasting" as "programming (exclusive of broadcast signals) carried on a cable television system over one or more channels and subject to the exclusive control of the cable operator." 47 C.F.R. § 76.5(p). Origination cablecasting -- as its name suggests -- applies to programming originated by an individual cable *operator*, not to programming provided by a cable *programmer*. *See* NCTA

(footnote continued…)

of "sponsorship" -- *i.e.*, paid product placements -- but also to entities and programming that were never the subject of the existing rules (*i.e.*, cable networks) "cannot reasonably be deemed an 'amendment' of the existing rules, for purposes of Section 624(f)(2)."[8]

Nor can the Commission rely on its ancillary authority to extend the sponsorship identification rules to cable networks. The Commission's ancillary authority under Section 4(i) or 303(r) of the Communications Act gives it the power to adopt rules that are necessary to achieve goals set out in the Act.[9] Ancillary authority does not give the Commission the power to adopt rules that are otherwise *prohibited* by the Act as would be the case here.[10]

Even assuming *arguendo* that the Commission had authority to impose sponsorship identification rules on cable networks, the Commission is obligated to construe its authority in ways to avoid -- not to create -- constitutional deficiencies.[11] It is incontrovertible that cable networks "engage in and transmit speech and . . . are entitled to the protection of the speech and press provisions of the First Amendment."[12] Here, First Amendment considerations require the Commission to interpret its authority to regulate speech-related activities narrowly, especially because there has been no demonstration of any public interest harm necessitating application of

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(…footnoted continued)

Comments at 4-5 (citing Commission precedent in support of this conclusion). *See also* National Media Providers Comments at 37-39; MPAA Comments at 2 n.4. This approach is further reflected in the Commission's sponsorship rule for origination cablecasting, which requires sponsorship identification where consideration is received by a cable operator, not a cable programmer. *See* 47 C.F.R. § 76.1615.

[8] NCTA Comments at 5 (noting that extending the rules to hundreds of cable programmers and thousands of hours of programming "would result in a fundamentally different rule").

[9] 47 U.S.C. §§ 154(i), 303(r); *see also See Am. Library Ass'n v. FCC*, 406 F.3d 689, 702 (D.C. Cir. 2005) (without specific statutory authorization, the Commission's purported authority is "ancillary to nothing").

[10] In fact, the record in this proceeding reflects that there are substantial doubts about the Commission's prior exercise of its ancillary authority in 1969 to impose identification requirements on origination cablecasting. *See* National Media Providers Comments at 37-39; NCTA Comments at 2 n.2; MPAA Comments at 2 n.4.

[11] *See U.S. v. X-Citement Video, Inc.*, 513 U.S. 64, 68-69 (1994); *see also* National Media Providers Comments at 40 ("the law must be interpreted to avoid constitutional conflicts").

[12] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) ("*Turner*").

the rules to cable networks. For the same reason, any rule mandating that cable networks carry sponsorship identification messages would violate the First Amendment rights of networks. The record is devoid of any non-conjectural evidence of a problem in need of redress, and there has been no demonstration of any "important or substantial" government interest that would justify any restriction on cable networks' free speech rights.[13]

## II. THERE IS NO BASIS FOR THE COMMISSION TO REVISIT THE EXEMPTION FROM THE SPONSORSHIP IDENTIFICATION RULES FOR FEATURE FILMS THAT ARE RE-BROADCAST BY A LICENSEE.

A few commenters[14] suggest that the Commission reverse its 1963 decision to exempt from the sponsorship identification rules feature films that are re-broadcast by a licensee.[15] However, there is no evidentiary basis for the Commission to revisit, let alone eliminate, the exemption, and regulation of feature films later carried by broadcasters would exceed the Commission's jurisdiction and violate the First Amendment.

In its 1963 proceeding to implement the sponsorship identification requirements of Section 317, the Commission properly concluded that the public interest would be served by exempting feature films that are re-broadcast by a licensee.[16] The Commission expressed concern that application of the rules to feature films would "have some disruptive and dislocating economic effects," which would "inhibit program production" and adversely affect "both the motion picture industry and the future supply of programs."[17] The Commission also determined

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13 *See id.* at 662; *see also* NCTA at 6-7 (discussing First Amendment problems with proposed regulations).

14 *See* Commercial Alert Comments at 26-27; Writers Guild of America, West Comments at 10; N.E. Marsden at 37-38.

15 *See* 47 C.F.R. § 73.1212(h) (exempting feature motion films distributed on broadcast from sponsorship identification rules); 47 C.F.R. § 76.1615(g) (exempting feature motion films distributed on origination cablecasting from sponsorship identification rules).

16 *See Amendment of Sections 3.119, 3.289, 3.654 and 3.789 of the Commission's Rules*, Docket No. 14094, 34 F.C.C. 829 ¶ 34 (1963) ("*Feature Film Exemption Order*").

17 *Id.* ¶ 35.

that "there is no evidence before us which tends to establish that any practices . . . prevail in [the motion picture] industry which improperly affect broadcasting."[18] Therefore, it properly declined to apply the rules to feature films.

The Commission made the correct judgment in 1963, and there is no factual or policy basis to revisit that determination now. It is black letter law that "[a]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."[19] The Commission acknowledged as much in its 1963 decision. When it decided not to apply the sponsorship identification rules to feature films carried on broadcast television, it noted that it would require solid evidence to change the rules, stating that "[b]efore we adopt a rule which might have some disruptive and dislocating effects and which might inhibit program production, we believe that we should have evidence indicative of a need for such rule."[20]

No such evidence has been produced here. While some commenters argue that there is "no compelling need to continue the exemption of feature films,"[21] this misstates the correct legal standard. The Commission must have a compelling reason to *repeal* the exemption, not to continue it.[22] The record in this proceeding provides no basis for such repeal. Other commenters allege that the number of, and revenue from, paid product placements are increasing, and cite this as a sufficient basis to apply the sponsorship identification rules to feature films.[23] But even if that is true, these commenters have failed to provide any evidence of public interest harm. The

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18 *Id.*

19 *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983).

20 *Feature Film Exemption Order* ¶ 35.

21 *See , e.g.*, Writers Guild of America, West Comments at 10.

22 *See State Farm*, 463 U.S. at 42.

23 *See* Commercial Alert Comments at 26-27; Writers Guild of America, West Comments at 10.

Commission stated in 1963 that it was "aware of no improper practices in the motion picture industry with respect to undisclosed sponsorship in general,"[24] and the Federal Trade Commission ("FTC") previously found no harm resulting from the use of product placements in films.[25] In short, there is no factual basis for the Commission to revisit its prior conclusion in this proceeding.[26]

Beyond these evidentiary hurdles, the Commission lacks the necessary legal authority to impose the identification requirements on feature films carried on broadcast television. The Commission stated in its 1963 decision that it had the power to impose sponsorship identification rules on feature films because "nothing in Section 317 . . . excludes films not produced exclusively for television from the requirements of Section 317."[27] That claim of statutory authority is now "entirely untenable," as subsequent court decisions make plain that the Commission cannot assert authority in a particular area merely "because Congress did not expressly foreclose the possibility."[28] There is no reference anywhere in Section 317 to the regulation of feature films when re-broadcast by a licensee and, therefore, no basis for the exercise of Commission authority.[29]

Furthermore, the extension of the sponsorship identification rules to feature films carried by broadcasters would raise significant First Amendment concerns. As an initial matter,

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[24] *Feature Film Exemption Order* ¶ 36.

[25] *See* FTC Denies CSC's Petition to Promulgate Rule on Product Placement in Movies (rel. Dec. 11, 1992), *available at* http://www.ftc.gov/opa/predawn/F93/csc-petit5.htm.

[26] *See* National Media Providers Comments at 42 ("As the FTC noted in its letter ruling declining to regulate precisely the practice at issue here -- product placement in motion pictures -- there is a 'lack of a pervasive pattern of deception and substantial consumer injury.'").

[27] *Feature Film Exemption Order* ¶ 20

[28] *MPAA v. FCC*, 309 F.3d 796, 805 (D.C. Cir. 2002); *see also Ethyl Corp. v. E.P.A.*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) ("We refuse . . . to presume a delegation of power merely because Congress has not expressly withheld such power.").

[29] *See* National Media Providers Comments at 42; MPAA at 6-7.

requiring sponsorship identification at the beginning or end of a program, or simultaneously with the appearance of the product, would be compelled speech because it would alter the content of the speech, and such a rule would fail under a strict scrutiny analysis.[30] But even under the less exacting *Central Hudson* standard for regulation of commercial speech,[31] a rule imposing sponsorship identification requirements on feature films carried by broadcasters would not pass constitutional muster.[32]

## III. THERE IS NO NEED TO ESTABLISH ADDITIONAL REQUIREMENTS WITH RESPECT TO CHILDREN'S TELEVISION.

The Campaign for a Commercial Free Childhood and the Children's Media Policy Coalition urge the Commission to explicitly ban paid product placements in children's programming, while at the same time acknowledging that it is really not necessary to do so.[33] As the Commission has posited, such product placements in children's programming "would run

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30 National Media Providers Comments at 47 (contending that a requirement of concurrent identifications would "require transmission of government approved disclosure during the program itself," and that such "content-based restrictions of speech are presumed to be invalid unless the government can demonstrate that such measures are the least restrictive means of serving a compelling government interest").

31 *Central Hudson Gas & Electric Corp. v Public Service Commission*, 447 U.S. 557 (1980).

32 Under *Central Hudson*, the government must demonstrate that: (1) there is a substantial government interest in regulating the speech; (2) the regulation directly and materially advances the government's interest; and (3) the regulation is no more extensive than necessary. *See id.* at 565-66. None of these elements is satisfied here. With respect to the first prong, no commenter has demonstrated that "the harms it recites are real and that [the] restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 506 U.S. 761, 770-71 (1993). With respect to the second prong, there is no "evidentiary support" that the proposed regulations will "significantly advance" the asserted governmental interest. *44 Liquormart, Inc. v. Rhode Island*, 533 U.S. 484, 505-06 (1996). And, with respect to the third prong, no commenter has shown that that the proposed regulations are narrowly tailored to the asserted interest, including "carefully calculating the cost and benefits associated with the burden on speech imposed by the regulations." *Lorillard Tobacco v. Reilly*, 533 U.S. 525, 561-63 (2001). *See also* National Media Providers Comments at 54-62; MPAA Comments at 7.

33 Children's Media Policy Coalition ("CMPC") Comments at 5; Campaign for a Commercial Free Childhood Comments at 15. CMPC also claims that the Commission should codify its tentative prohibition on interactive advertising during children's programming. As CMPC acknowledges, this issue is pending in another proceeding, *see* CMPC Comments at 9-12, and is more properly addressed there.

afoul of our separation policy because there would be no bumper between programming content and advertising."[34] The Children's Media Policy Coalition agrees with that conclusion.[35]

Adding new language to the rules would be duplicative of the significant legal and regulatory apparatus that Congress, through the Children's Television Act,[36] and the Commission have already put in place. Specifically, the Commission's separations policy, the prohibition on "host-selling," and limits on program-length commercials during children's programming already significantly restrict inappropriate commercialism in children's television.[37] As the National Media Providers note, these rules have been successfully enforced against violators, and, consequently, programmers are aware of the restrictions and "capable of and willing to" comply.[38] As a result, there is no reason to adopt new or expanded rules in this area.

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34 NOI/NPRM ¶ 16.

35 *See* CMPC Comments at 5.

36 Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. §§ 303a, 303b, 394.

37 *See Children's Television Report and Policy Statement*, 50 FCC 2d. 1 ¶¶ 49, 51-52 (1974); *see also* NPRM/NOI ¶ 16.

38 National Media Providers Comments at 32 & nn. 35-37.

For the foregoing reasons, Time Warner respectfully requests that the Commission refrain from imposing sponsorship identification requirements on cable networks, revisiting the exemption for feature films that are re-broadcast by licensees, or adopting new rules for children's television.

Respectfully submitted,

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